No. 87-1295

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW SOKOLOW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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13 pp

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1. The principal holding of the court of appeals was that, in order to establish reasonable suspicion that a person passing through an airport is in possession of narcotics, the government must satisfy a strict two-part test. Under that test, a law enforcement officer must be able to identify at least one factor constituting direct evidence that a person is engaging in narcotics trafficking. The officer may then rely on circumstantial evidence indicating that smuggling is afoot only if he can substantiate those facts with empirical or statistical proof. As we showed in our opening brief (at 25-37), that overly technical standard is inconsistent with the Fourth Amendment

principles that this Court has repeatedly endorsed to guide the reasonable suspicion inquiry.

Respondent has not answered our arguments as to why the Ninth Circuit's test is erroneous. He has not pointed to any decision of this Court endorsing that type of technical approach to the reasonable suspicion determination, nor has he sought to reconcile that test with the settled Fourth Amendment principles discussed in our opening brief. Indeed, he makes no effort to defend the Ninth Circuit's two-part reasonable suspicion test.

Respondent does make a related argument, however. He claims (Br. 14-21) that the so-called "drug courier profile" should not be used to determine reasonable suspicion, because its characteristics fit a large number of innocent travelers as well as narcotics couriers. Although respondent seeks to characterize the issue in this case as turning on the validity of the "drug courier profile," we do not and have not relied on any such "profile" in this case. We argue simply that all the factors known to the agents, taken together, provided a reasonable basis for them to suspect that respondent was carrying narcotics when he returned to Honolulu from Miami.

To be sure, in deciding that the evidence justified detaining respondent briefly, the agents relied on their own experience and the experience of other agents, which suggested that factors such as using an alias, paying cash for tickets, and not checking luggage may justify the suspicion that an individual is transporting narcotics. But the agents' reliance on those factors did not reflect any mechanical application of a magical "profile"; it simply reflected the agents' ability to make judgments and draw inferences, based on their training and experience, that

might elude lay observers. See *Florida* v. *Royer*, 460 U.S. 491, 525-527 n.6 (1983) (Rehnquist, J., dissenting). It would be irrational to denigrate an agent's judgment on the ground that the facts known to him had been observed by other agents on other occasions and had proved to be reliable indicators of criminal acitvity. See *United States* v. *Cruz-Valdez*, 773 F.2d 1541, 1546-1547 (11th Cir. 1985) (en banc), cert. denied, 475 U.S. 1049 (1986) (footnote and citation omitted) ("[W]e frequently take into account matters of common sense or general knowledge. That knowledge changes with changing times and conditions. It is an unfortunate fact of modern life that juries and courts know more about commerce in controlled substances than they did a decade or more ago. We also know without specific evidence matters that have been proved in prior prosecutions."). It would make little sense for law enforcement agencies to train officers in narcotics enforcement if the agents could not use in the field what they have learned. Indeed, the practice of compiling and sharing information about the behavior of particular types of criminals can lessen the number of intrusions based on a hunch or random guesswork. A law enforcement practice of this type, therefore, is one that should be applauded, not discouraged, by the courts.

While respondent addresses several of the factors that the agents relied on, he makes the same error that the court of appeals made in its first opinion in this case (see U.S. Br. 7, 25): he considers the probative value of each factor separately. Any number of factors standing alone may appear entirely innocent. For example, not everyone who is young, who is casually dressed, who uses only carry-on luggage for a long journey, or who takes a trip to Miami is

a narcotics smuggler. But when all of those facts are taken together and considered along with other evidence in the case, they can be incriminating. For that reason, this Court's decisions require that all of the facts be considered in their entirety when determining if there is reasonable suspicion. *United States* v. *Cortez*, 449 U.S. 411, 417 (1981).[1]

Moreover, this is not a case in which the only evidence to support the detention is "a police officer's trained instinctive judgment operating on a multitude of small gestures and actions impossible to reconstruct" (*Sibron* v. *New York*, 392 U.S. 40, 78 (1968) (Harlan, J., concurring in the result)), even though that may be sufficient in some instances.[2]

[1] The lower court decisions cited by respondent (Br. 15-21) make the same point. They state that the mere fact that a person shares one or several characteristics with a drug courier does not establish reasonable suspicion that the individual is engaged in narcotics trafficking, a proposition with which we agree. But those decisions also hold that all of the facts known to an officer must be considered in their totality, and they agree that facts of the sort present in this case are probative. Finally, none demands that the government supply the type of empirical or statistical proof that the Ninth Circuit required in this case.

[2] Respondent claims (Br. 18) that the agents improperly relied on a "subjective perception[]" when they concluded that respondent was nervous both when he paid for his tickets and during his layover in Los Angeles on his return trip. Some observations—including ones that are very important to the determination of reasonable suspicion—are necessarily "subjective." It is for the court to determine whether the officers' subjective impressions were reasonable (and were not the product of post-hoc invention). In this case, respondent had the opportunity to cross-examine the agents at the suppression hearing and to try to persuade the district court to discredit their testimony. The district court, however, chose to believe the agents. Pet. App. 48a.

Respondent's large cash purchase of airline tickets, his apparent use of an alias, his long trip to a major cocaine distribution center, and his brief stay in that city are all objective facts from which an experienced narcotics officer could infer that respondent was involved in drug trafficking.[3]

2. Respondent argues (Br. 12-13, 21-23) that his detention was invalid because the agents did not pursue the least intrusive means available to them to determine whether respondent was in possession of drugs. In respondent's view, the agents should have simply approached and spoken with him, instead of forcibly detaining him, in order to verify their suspicions.

As support for that argument, respondent relies principally on the statement in *Florida* v. *Royer*, 460 U.S. at 500 (plurality opinion), that "the investigative methods employed [to effect an investigative detention] should be the least intrusive means reasonably available to verify or dispel the officer's sus-

[3] Respondent argues (Br. 26) that "[i]t is also not uncommon for individuals to use aliases in travel for reasons ranging from business to extra-marital affairs and even concealing a person's national origin or religious belief." We agree with respondent that some persons may use an alias when traveling for "business" reasons; after all, respondent did precisely that. It is also true that some persons may use an alias when traveling to parts of the world in which religious or ethnic persecution is an unfortunate fact of life. Miami, however, is hardly one of those areas. But what is most interesting about respondent's suggestion is his ability to devise a possible (even if highly unlikely) explanation for his use of an alias without first compiling the type of empirical or statistical proof that the Ninth Circuit demanded of narcotics agents. We ask only that law enforcement officers be allowed to draw the same (and in this case far more reasonable) type of commonsense inference from the facts known to them.

picions in a short period of time."[4] That statement, however, was directed toward the proposition that the *scope* of a detention must be reasonably limited to an officer's need to determine whether a crime may be afoot. *Royer* does not support the quite different proposition, on which respondent's argument rests, that a stop is *unjustified* if there is a less intrusive means available to an officer to verify or dispel his suspicions. In fact, the plurality in *Royer* upheld the initial detention of Royer without pausing to determine whether the officers had a less intrusive means of discovering whether he possessed narcotics. *Id.* at 502. *Royer* thus does not support respondent's claim that the agents' conduct in this case was improper.

Because there will be situations in which "the officer ha[s] to act quickly if he [is] going to act at all" (*Sibron* v. *New York*, 392 U.S. at 78 (Harlan, J., concurring in the result)), law enforcement authorities "must be allowed 'to graduate their response to the demands of any particular situation.'" *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (quoting *United States* v. *Place*, 462 U.S. 696, 709 n.10 (1983)). For that reason, the Court has cautioned against "indulg[ing] in 'unrealistic second-guessing,'" because "'creative judge[s], engaged in *post hoc* evaluations of police conduct[,] can almost always imagine some alternative means by which the objectives of the police might have been accomplished.'" *United States* v. *Montoya de Hernandez*, 473 U.S. at 542 (quoting *United States* v. *Sharpe*, 470 U.S. 675, 686-687 (1985)).[5] Accordingly, while it is preferable for a narcotics agent to pursue the least intrusive method of investigation—and DEA agents are instructed to follow that approach—an agent does not act unlawfully by detaining a suspect based on reasonable suspicion that the suspect may be involved in a crime, rather than by merely speaking with him.

The facts of this case demonstrate why a "least intrusive means" rule would be unworkable as applied to officers' decisions to detain suspects. The line between a police encounter with a suspect and a detention is often a subtle one, depending on matters such as whether the officer touches the suspect or examines his identification and does not immediately return it. In this case, the district court found that the agents conducted a stop because, while respondent was waiting to enter a taxicab, one of the agents

[4] Respondent also cites (Br. 22) *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-882 (1975), but that case is wholly inapposite. That case held that border patrol officers cannot make random stops of vehicles in border areas, but can effect an investigative detention if there is reasonable suspicion that the vehicle contains illegal aliens. The Court did not suggest that an investigative detention would be unlawful if there is a less restrictive alternative available to the border patrol officers to determine whether a vehicle may be smuggling illegal aliens.

[5] In other contexts as well, the Court has held that "the real question is not what 'could have been achieved,' but whether the Fourth Amendment *requires* such steps[.] * * * The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois* v. *Lafayette*, 462 U.S. 640, 647 (1983) (emphasis in original). The reason is that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976). Accord *Colorado* v. *Bertine*, 479 U.S. 367, 373-375 (1987); *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973).

took respondent by the arm and guided him back to the sidewalk to be seated. Pet. App. 47a, 57a; J.A. 31-32. The officers' conduct in this case, while held to be a detention for Fourth Amendment purposes, was not so remote from the line between detentions and mere encounters, which do not constitute Fourth Amendment "seizures" at all, that the officers can be said to have obviously acted with undue force. Compare *INS* v. *Delgado*, 466 U.S. 210, 219-221 (1984) (agent tapped individual on the shoulder to get his attention and then questioned individual). While it is sensible to require that officers establish reasonable suspicion for a stop when they cross that line, it would impose extravagant and unjustified costs on law enforcement to adopt respondent's position, which would require suppression of evidence whenever law enforcement officers conducted a stop without first attempting a consensual encounter, regardless of the strength of the agents' suspicion. In this case, moreover, it is far from clear that the agents had any choice other than to detain respondent, since he had left the terminal and was about to board a taxicab when they stopped him.

3. Respondent contends (Br. 13-14, 23-28) that the facts known to the agents did not constitute reasonable suspicion that he was bringing cocaine back to Hawaii from Miami. For the reasons discussed in our opening brief (at 15-23), that claim is without merit. The evidence in this case is stronger than the evidence present in *Florida* v. *Royer*, *supra*, in which eight Members of this Court agreed that the officers had reasonable suspicion that the suspect was involved in narcotics smuggling. U.S. Br. 24-25. Respondent makes no effort to distinguish this case from *Royer*, and the argument that he does advance is flawed in several respects.

First, respondent overlooks or does not accurately characterize many of the facts known to the officers. Respondent did not merely pay for his airline tickets in cash. Rather, he purchased $2100 in tickets with a large roll of $20 bills, and he received half of that roll back from the airline ticket agent. Respondent did not merely fly to Miami for two days. Rather, he spent a day traveling 2100 miles from one tropical locale to another—which just happens to be the nation's principal source city for cocaine—for only a two-day stay. Respondent did not merely live at an address where the telephone was listed under someone else's name. Rather, he left a recording on the answering machine at that address.[6] And respondent did not merely appear nervous during his layover in Los Angeles on his return flight. Rather, he "appeared to be very nervous and was looking all around the waiting area." J.A. 43-44. Those additional cir-

[6] Respondent criticizes (Br. 26) the agents for not conducting a further inquiry in order to reconcile the inconsistency between the name that he gave to the airline (Andrew Kray) and the name under which his telephone was listed (Karl Herman). He argues that if the agents had done so, they would have learned that Karl Herman was his roommate, which would have eliminated the discrepancy. That argument is mystifying, because respondent *was* traveling under an alias. The agents would only have confirmed their suspicions if they had conducted the inquiry that he suggests.

There is also no merit to respondent's claim (Br. 26) that the agents' inference that he was using an alias is "irreconcilable" with the fact that he gave the airline his correct telephone number. There are at least two reasonable explanations for respondent's use of his true phone number. First, a false telephone number would surely have aroused suspicion if it had been checked. Second, when asked his phone number, respondent may have been too nervous to invent a false number on the spot.

cumstances are important, because they help to support the inference that respondent was not simply a member of the ordinary traveling public, but was engaged in wrongdoing.

Second, respondent ignores the fact that the agents did not need proof beyond a reasonable doubt, or even by a preponderance of the evidence, that he was involved in narcotics smuggling before they could briefly detain him. As we showed in our opening brief (at 13-14, 18-19, 27-28), to effect an investigative detention a law enforcement officer need only point to facts indicating that a crime "may be afoot" (*Terry* v. *Ohio*, 392 U.S. 1, 30 (1968)), which imposes only "some minimal level of objective justification to validate the detention or seizure." *INS* v. *Delgado*, 466 U.S. at 217. Even if the likelihood was less than 50-50 that respondent possessed cocaine (and if it was, it was not much less), the agents were entitled to act on that conclusion by briefly detaining him for questioning.[7]

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[7] The author of the article on which respondent heavily relies, Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U.L. Rev. 843 (1985), makes the same mistake as respondent. The author criticizes the so-called drug courier profile in part because "[e]ven the most favorable figures cited by the agents fall far short of establishing the drug courier profile's validity." *Id.* at 876 (citing *Florida* v. *Royer*, 460 U.S. at 526 n.6 (Rehnquist, J., dissenting)). According to those figures, the author states that "fully 40% of the people ostensibly conforming to the profile and apparently subjected to some form of search or other investigation did not carry drugs." *Id.* at 876 n.136. An investigative technique that is correct 60% of the time, however, establishes more than reasonable suspicion; it establishes probable cause. *Illinois* v. *Gates*, 462 U.S. 213, 235, 238, 243-244 n.13 (1983); U.S. Br. 27-28.

For the foregoing reasons and those given in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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OCTOBER 1988

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